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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 71

SARAH ELIZABETH STRINGFELLOW, A WIDOW,
PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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A CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SARAH ELIZABETH STRINGFELLOW, a widow, prays that a writ of certiorari issue to review the judgment entered March 31, 1933, in the United States Court of Appeals for the Fifth Circuit (R. 104) in the above entitled cause.

Questions Presented.

The sole question presented in this case is whether damages can be recovered against a railroad company under Sections 7051 and 7052, Compiled General Laws

of Florida, 1927, for the death of a driver of an automobile at a railroad and street intersection where the view at the crossing is obstructed and when it appears that both the driver of the automobile and the railroad company were negligent.

Statutes Involved.

Compiled General Laws of Florida, 1927, provide:

> "A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." Section 7051.

> "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him." Section 7052.

Statement.

Petitioner, in her own right as widow and as administratrix, on May 25, 1931, brought five separate actions in the District Court of the United States for the Southern District of Florida, Tampa Division (R.

28, 11, 19, 2, 36), against the railroad company for negligently running its train upon and fatally injuring her husband and two minor children at a street crossing in the city of Dunedin, Florida. A satisfactory statement of facts is found in the opinion of the Circuit Court of Appeals (R. 93-95), which we quote, but to which we have added in brackets the record page references of the facts thus recited:

> "The accident, which resulted in the injuries alleged, occurred in the daytime at a grade crossing where Scotland Street intersects the railroad right-of-way at right angles, the street extending east and west and the right-of-way north and south (R. 56). On the right-of-way the main line was flanked on either side by a side track (R. 64). To the south of the crossing the main line was straight for a mile or more, but the view in that direction of one going east on the street was cut off by trees until the west side track, within 20 feet of the main line, was reached, at which point the view to the south was open and unobstructed (R. 61, 86 and photographs). At the time of the accident appellant's husband was driving his automobile, in which his children, one seven, and the other nine, years of age, were riding with him, toward the east across the intersection; and the train was coming from the south. The train was a few minutes late (R. 60, 67) and was not due to stop at Dunedin (R. 85). A strong wind from the northwest interfered with the hearing of anyone at the crossing who might be listening for the rumble of the train, or for any warning that might have been given by whistle or bell (R. 60, 74). The evidence was in hopeless

conflict as to whether the whistle was sounded or the bell was rung, and also as to the speed of the train. Several witnesses for appellant who were near the place of the accident and in position to hear testified that they heard no whistle or bell; and they gave various estimates of the rate of speed, ranging from 30 to 50 miles per hour (R. 56, 57, 58, 60, 62, 63, 88). Two of these witnesses cited as evidence of their ability to estimate speed speedometer tests which they had made, while traveling by automobile on highways parallel with railroad tracks, of the speed of trains going in the same direction as they were (R. 56, 59). On the other hand, witnesses for appellee, particularly the engineer (R. 64), fireman (R. 67) and members of the train crew (R. 81, 84), testified that as the train approached Scotland Street the last of four blasts of the whistle was sounded, and that the bell was being rung by an automatic bell ringer from the time the train reached the fourth street south of Scotland Street until after the accident. Members of the train crew also testified that the train had slackened speed as it passed through Dunedin, and that it was running at a rate not exceeding 10 or 12 miles per hour as it approached Scotland Street. The fireman (R. 67) testified that he saw appellant's husband drive upon the crossing about 60 feet in front of the engine, and that he called to the engineer, who immediately put on the emergency brakes as soon as the fireman called out to him and stopped the train as quickly as possible. The engine proceeded about 100 yards north of Scotland Street before it was brought to a standstill (R. 62). Several witnesses for appellee testified that appellant's husband drove

> across the intersection at a speed of 10 or 15 miles per hour (R. 68, 80); but the testimony as a whole leaves it uncertain whether he stopped or slackened speed when he arrived at the crossing, and whether he actualy saw the train."

By direction of the district judge the cases were consolidated for trial (R. 54).

Negligence of the railroad company was alleged in failing to give warning of the approach of the train by sounding the whistle or ringing the bell of the engine and in running the train upon the street crossing at a dangerous rate of speed (R. 28). The railroad company pleaded not guilty (R. 35).

Rulings of the Court Below.

At the close of all the evidence the district court directed a verdict for the railroad company upon the ground that the injuries complained of were caused solely by the negligence of the petitioner's husband, driver of the automobile, and said in part (R. 88-89):

> "Gentlemen, between the Supreme Court of the United States and the Circuit Court of Appeals and the Supreme Court of Florida, they have got the Judge between the devil and the deep blue sea. The Supreme Court of the United States says that failure to stop, look, and listen is negligence. In a case that went up from Ohio they said that would defeat any recovery. Now the Circuit Court of Appeals, after that decision was rendered, have held that in Florida, under this apportionment statute that it would not necessarily defeat a recovery, and I think that is the better rule where the evi-

> dence shows that the proximate cause of the injury was the negligence of the railroad company and that failure to stop, look and listen was only contributory; but if the failure to stop, look and listen is the ultimate cause, then I am satisfied that there can be no recovery * * *."

In each case separate verdicts (R. 45-46) and judgments were entered (R. 46-49) and on the 20th day of April, 1932, separate appeals were taken to the Circuit Court of Appeals for the Fifth Circuit (R. 50-51), but on a single transcript and were docketed in the Circuit Court of Appeals as one case, argued as one case, and were disposed of by a single written opinion. The judgments appealed from were reversed on March 31, 1933, as to all actions *except* the one brought by petitioner in her own right as widow for the death of her husband (R. 104). A petition for rehearing was denied on April 21, 1933 (R. 116), and on April 21, 1933, the Circuit Court of Appeals entered an order granting petitioner's motion for a severance from all of her co-appellants for the purpose of filing a petition in this Court for a writ of certiorari (R. 115-116). Order staying the mandate was filed April 27, 1933 (R. 118-119).

The Circuit Court of Appeals, in its opinion, — Fed. (2d) — (R. 93), said in part (R. 95-96, 97):

> "In so far as the case depends upon appellant's right to recover for the death of her husband, we are of opinion that it was not error to direct a verdict for appellee. Her husband, as driver of the automobile, was under the duty to exercise the care and caution which a reasonably prudent man would have displayed under

same or similar circumstances. It therefore was his duty to use his senses of sight and hearing before undertaking to cross the railroad tracks. If when he had passed the trees and had an open view down the track he had looked he would have seen the train and could have avoided the collision. A careful and prudent driver of an automobile would not under the circumstances have undertaken to drive over the crossing in front of the approaching train. Notwithstanding Paragraph 7052 he could not have recovered for an injury, and so recovery cannot be had on account of his death. * * * In our opinion the right of recovery for the deaths of the children should have been submitted to the jury. The children were guilty of no negligence; and their father's negligence could not be imputed to them. The judgment is defended as to them only on the theory that the father's negligence was the sole proximate cause of their deaths. But the jury might reasonably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company. There was substantial evidence, tending to prove that no warning by whistle or bell was given and that the train was being operated at a negligent and dangerous rate of speed, to support the conclusion that the collision would not have occurred if the warning had been given or if the train had been operated at a more moderate and reasonable rate of speed. It was for the jury, not the court, to say whether it was negligence to run the train through a populous community without warning, or at a speed so great that it could not be stopped within less than 100 yards; especially if because of a strong headwind it

> was made difficult for those using the street intersection to hear a train approaching from the south * * * here it was opened for the jury to find that appellant's husband did not know or realize that a train was approaching. It does not appear in this case that the driver was racing with the train in an attempt to pass ahead of it over the crossing."

Reasons for Granting the Petition.

The decision in this case holds that by reason of the failure of the driver to see the train "When he passed the trees and had an open view down the track" (R. 96) petitioner, "notwithstanding paragraph 7052" (R. 96), could not recover for his death, yet the court also holds with reference to petitioner's right to recover for the death of the children that "the jury might have reasonably concluded that their deaths were caused by the combined or concurring negligence of their father and the railroad company" (R. 96) and held that it appeared by the record that there was substantial evidence of the railroad company's negligence and it was a question for the jury to determine. On the other hand, the Supreme Court of the State of Florida has uniformly held that damages could be recovered for injury to the driver of an automobile where the injury was caused by the "combined or concurrent negligence" of the driver and the railroad company:

> "Under the laws of Florida, where a person attempts to drive an automobile over a railroad crossing with which he is familiar, when his view of the railroad track is so obstructed that an

approaching train cannot be seen, and he does not stop and look and listen or take such precautions for his sake as are reasonably required by the existing circumstances, he is negligent so as to prevent recovery of damages from a railroad company for his injury or death by being struck by the train, unless some appreciable negligence of the railroad company's agent proximately contributed to such injury or death in which case the damages awarded should be such a proportion of the entire damages sustained as the defendant's negligence bears to the combined negligence of both parties."

Florida East Coast Railroad Company v. *Townsend,* 140 So. 196, 198, and cases cited therein.

The result is, if the decision of the Circuit Court of Appeals is to stand, one rule will prevail in the Federal courts in Florida on the question while a different rule will prevail in the State courts, which, we submit, in the interests of uniformity, should be decided by this Court, and we contend further it should be decided in accordance with the construction the State courts place upon its statutes.

The importance of the question presented is due to the large number of street and highway intersections with railroad grade crossings in the State of Florida and the large number of automobiles driving over these crossings, the litigation that is sure to result and the conflicting determination of the question presented in the State and Federal courts.

Your petitioner presents herewith, as a part of this petition, a certified copy of the transcript of the rec-

ord in the courts below, and will present her brief for consideration with this petition, discussing at greater length the question involved.

WHEREFORE your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and proceedings in said cause, entitled: Sarah Elizabeth Stringfellow, a widow and as administratrix, etc., *vs.* Atlantic Coast Line Railroad Company, a corporation, and numbered 6617 in said court, to the end that said case may be reviewed and determined by this Court, and that the petitioner may have such relief as this Court may deem proper, and that the opinion and judgment of said Circuit Court of Appeals and of said District Court may be reversed by this Honorable Court.

SARAH ELIZABETH STRINGFELLOW,
By WM. C. MCLEAN,
Her Attorney.

BRIEF.

Opinions Below.

The opinion of the Circuit Court of Appeals (Circuit Judges Bryan, Sibley and Hutcheson, Judge Bryan writing, Judge Hutcheson dissenting and writing a separate opinion) was filed March 31, 1933, and appears at page 93 of the record. It is reported in — Fed. (2d) —.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (*a*) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U. S. C. A. 347. The judgment of the Circuit Court of Appeals was entered March 31, 1933 (R. 104). Petition for rehearing was denied April 21, 1933 (R. 116).

The Facts.

The facts are stated in the petition. We emphasize that the proof showed that both the petitioner's husband and the railroad company were legally negligent, that is, the negligence of each proximately contributed or concurred to produce the injury and death of petitioner's husband.

ARGUMENT.

Can damages be recovered against a railroad company under Sections 7051 and 7052, Compiled General Laws of Florida, 1927, for the death of the driver of an automobile at a railroad crossing, in a case where it

appears that the driver does not take such precautions for his safety as are reasonably required by the existing circumstances, yet some appreciable negligence of the railroad company proximately contributed to his death?

Conflict of Decisions.

The Supreme Court of the State of Florida has answered this question in the affirmative: "In which case the damages awarded should be such a proportion of the entire damages sustained as the defendant's negligence bears to the combined negligence of both parties."

Florida East Coast R. R. Co. v. *Townsend,* 140 So. 196, 198, 142 So. 909, 143 So. 445.

The Circuit Court of Appeals has answered this question in the negative.

In the separate dissenting opinion of Mr. Justice Hutcheson (R. 98) the conflict of the majority opinion with the above quoted statute and to the meaning and effect given to the words of the statute by the Florida decisions is very clearly set forth. Two additional citations will serve to show the conflict more strongly. In *Seaboard Air Line Ry. Co.* v. *Watson,* 137 So. 719 (decided November 12, 1931), appeal dismissed November 7, 1932, — U. S. —, 77 Law Edition 68, the Florida Supreme Court said, 137 So., at top of page 723:

> "Where injury at a railroad crossing is caused solely by the negligence of a party injured, there can be no recovery; but if the injury was caused

by running of the train, and both the injured party and the employees of the company were at fault, there may be recovery, but damages will be reduced in proportion to contributory negligence. Section 7051 (4964) and Section 7052 (4965) *Compiled General Laws of Florida* of 1927; *Atlantic Coast Line R. Co.* v. *Watkins*, *supra* (97 Fla. 350, 121 So. 195); *Germak* v. *Florida East Coast Ry. Co.*, 95 Fla. 991, 117 So. 391; *Louisville & Nashville Ry. Co.* v. *Harrison*, 84 Fla. 479, 94 So. 382; *Tampa Electric Co.* v. *Bryant* (Fla.), 133 So. 887."

The Florida Supreme Court has recognized the standard of care required of a person in crossing a railroad track as announced by this Court in *B. & O. R. R. Co.* v. *Goodman*, 275 U. S. 66, 48 S. Ct. 24, 72 Law Ed. 167, but has applied it to the Florida Statute in a manner different from the majority opinion of the Circuit Court of Appeals in this case. In *Germak* v. *Florida East Coast Ry. Co.* decided May 30, 1928, 95 Fla. 991, 117 So. 391, at page 392, after quoting the language of Mr. Justice Holmes in the Goodman case, the Florida Supreme Court said:

"(3) This rule has reference to the standard of conduct required by the law of persons in crossing railroad tracks. It does not relate to the standard of duty imposed upon railroad companies or define the liability of such companies under a statute like the one in Florida which provides that:

"'A railroad company shall be liable for any damage done to persons * * * by the running of the locomotives, or cars * * * unless the

company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.' 'No person shall recover damages from a railroad company for injury to himself or his property * * * caused by his own negligence. If the complainant and the agents are both at fault, the former may recover, but the damages shall be diminished or increased * * * in proportion to the amount of default attributable to him.' Sections 4964, 4965, Rev. Gen. Stats. 1920."

"(4, 5) Under the above statutory provisions, the rule announced by the Supreme Court of the United States in the Goodman case, *supra,* may be an appropriate standard of care required of a person in crossing a railroad track, to be applied in actions to recover damages for personal injuries received by collision with a train at a railroad crossing, and negligence of the injured person may appear from his failure to observe the required standard, which would bar recovery under the law in some states, see *Penn. R. Co.* v. *Rusynik* (Ohio), 159 N. E. 826; yet, under the Florida Statute, if an injury is duly alleged and shown to have been caused by the running of a railroad company's train, there may be a recovery for damage done, unless the company shall make it appear that its employees exercised all ordinary and reasonable care and diligence in the premises, *Tampa El. Co.* v. *Bazemore,* 85 Fla. 164, 96 So. 297; but if it appears that the injury was caused solely by the negligence of the party injured, there can be no recovery, *S. A. L. Ry. Co.* v. *Myrick,* 91 Fla., 918, 109 So. 193; *S. A. L. Ry. Co.* v. *Toberlin,* 70 Fla.

435, 70 So. 437; *Tampa El. Co.* v. *Bourquardez*, 72 Fla. 161, 72 So. 668; and, if both the injured and the employees of the railroad company were at fault in causing the injury, there may be a recovery, but the damages will be reduced in proportion to the contributory negligence of the injured party. *L. & N. Ry. Co.* v. *Norton*, 75 Fla. 597, 78 So. 982; *A. C. L. Ry. Co.* v. *Weir*, 63 Fla. 69, 58 So. 641, 41 L. R. A. (N. S.) 307, *Ann. Cas.* 1914A, 126; *Davis* v. *Cain*, 86 Fla. 18, 97 So. 305; *Stevens* v. *Tampa El. Co.* 81 Fla. 512, 88 So. 303; *S. A. L. Ry.* v. *Callan*, 73 Fla. 688, 74 So. 799, 35 S. Ct. 654, 59 L. Ed. 1069; *Ann. Cas.* 1914C, 172, 109 So. 432."

We emphasize the language of Mr. Justice Hutcheson's separate dissenting opinion at Record page 103.

"In *Claughton* vs. *Atlantic Coast Ry.*, 47 Fed. (2) 679, this court correctly announced and applied the Florida rule that while the sole negligence of a father is a bar to recovery for a crossing injury, contributory negligence is not. Such negligence bars neither the driver nor those in the vehicle with him. It merely diminishes the amount of the recovery of those negligent or responsible for the negligence. *Bradley* vs. *Mo. Pac. Ry.*, 288 Fed. 484. The opinion of the majority advances a third view as maintainable in Florida, that there are degrees of contributory negligence, and that a driver may be so contributory negligent as that though the recovery of those in the car with him will not be barred because his negligence is not the sole but a concurring proximate cause of the injury, his own recovery will be. I find no warrant in the

Florida statute nor in any of its decisions, for this view. I think it overrules the Claughton case. I respectfully dissent from it."

After the decision of this Court in *B. & O. R. R. Co.* v. *Goodman, supra,* there arose a conflict in the Federal and State courts in Florida upon the question involved in this case. The law became well settled in the State courts after the decision of the Florida Supreme Court in *Germak* v. *F. E. C. R. R. Co., supra;* and the law also appeared to be well settled in the Federal courts after the decision of the Circuit Court of Appeals in *Claughton* v. *A. C. L. R. R. Co.,* 47 Fed. (2) 679, wherein the Germak case was cited with approval, but confusion is now sure to result unless this Court will once and for all definitely settle the rule to be followed by the Federal courts in Florida.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that petitioner could not recover damages for the death of her husband under Section 7052, Compiled General Laws of Florida, 1927, notwithstanding the fact that the evidence did not establish as a matter of law that the husband's negligence was the sole proximate cause of the injury, but no more than a concurring proximate cause.

2. In holding that petitioner was not entitled to have the question of her right of recovery for the death of her husband submitted to the jury.

Statement of Law Advanced.

Under Section 7052, Compiled General Laws of Florida, 1927, contributory negligence does not bar a recovery, but merely diminishes the amount of recovery in proportion to the contributory negligence of the injured party.

Conclusion.

Your petitioner respectfully submits that the final determination by this Court of the question involved in this case is of the utmost importance to the rights of travelers on the streets and highways of Florida intersecting with railroad grade crossings, as well as uniformity of law in the State and Federal courts of Florida in the large number of cases that will arise from the continued passage of automobiles over railroad grade crossings.

Respectfully submitted,

WM. C. MCLEAN,
Attorney for Petitioner.